RECORD AND BRIEFS

Nos. 16–1436 & 16–1540

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DONALD J. TRUMP,
President of the United States, *et al.*,
Petitioners,

vs.

INTERNATIONAL REFUGEE ASSISTANCE PROGRAM, *et al.*,
Respondents.

DONALD J. TRUMP,
President of the United States, *et al.*,
Petitioners,

vs.

STATE OF HAWAI'I, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY

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QUESTIONS PRESENTED

These cases involve the validity of Executive Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017). Section 2(c) of that order suspends for 90 days the entry of foreign nationals from 6 countries that Congress or the Executive previously designated as presenting heightened terrorism-related risks, subject to case-by-case waivers. Section 6(a) suspends refugee admissions for 120 days. Section 6(b) reduces the number of refugees to be admitted in Fiscal Year 2017.

The questions presented are:

1. Whether respondents' challenge to the temporary suspension of entry of aliens abroad is justiciable.

2. Whether section 2(c)'s temporary suspension of entry violates the Establishment Clause.

3. Whether the global injunction, which rests on alleged injury to a single individual plaintiff, is impermissibly overbroad.

4. Whether the order complies with the Immigration and Nationality Act.

5. Whether the challenges to section 2(c) became moot on June 14, 2017.

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to partici-

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1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

pate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, two courts of appeals have upheld injunctions against a temporary section of an executive order issued by the President "to protect the Nation from terrorist activities by foreign nationals admitted to the United States . . . ." Although the enjoined section will have expired by the time this case is argued, the precedents of judicial interference set in these cases may hamstring the current President's and future Presidents' abilities to protect the people from foreign dangers. The continued precedential effect of these decisions is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Only a brief summary is needed here to frame the issues discussed in this brief.

On January 27, 2017, President Donald J. Trump issued Executive Order No. 13769, Protecting the Nation From Foreign Terrorist Entry Into the United States. 82 Fed. Reg. 8977 ("EO-1"). Section 3(c) of this order suspended entry of aliens from seven countries for 90 days. "Two States challenged the Executive Order as unconstitutional and violative of federal law, and a federal district court preliminarily ruled in their favor and temporarily enjoined enforcement of the Executive Order." *Washington* v. *Trump*, 847 F. 3d 1151, 1156 (CA9 2017) (*per curiam*). The Ninth Circuit found that EO-1 violated the due process rights of lawful permanent residents and potentially others, see

id., at 1165-1166, and denied a motion for a stay pending appeal. *Id.*, at 1169. "Rather than continue with the litigation, the Government filed an unopposed motion to voluntarily dismiss the underlying appeal after the President signed EO2." *Hawai'i* v. *Trump*, 859 F. 3d 741, 757 (CA9 2017) (*per curiam*). "EO-2" is Executive Order No. 13780, Protecting the Nation From Foreign Terrorist Entry Into the United States. 82 Fed. Reg. 13209 (Mar. 6, 2017).

EO-2 also had a 90-day suspension provision, § 2(c), but it was more limited. Iraq was no longer included because of improvements in that country. See § 1(g). The order exempted persons with due process rights to entry by limiting its scope to persons who were outside the country and did not have a valid visa on the date of issuance of EO-1, and by specifically exempting lawful permanent residents and several other categories of persons. See EO-2, § 3(a) and (b). The duration of the suspension was "90 days from the effective date of this order," § 2(c), and the effective date was specified as March 16, 2017. § 14.

The Fourth Circuit, with three judges dissenting, affirmed a nationwide injunction against § 2(c), lifting it only as applied against the President himself. *International Refugee Assistance Project* v. *Trump*, 857 F. 3d 554, 604-606 (CA4 2017). In a separate suit, the Ninth Circuit affirmed a broader injunction against Sections 2 and 6 of the Executive Order on nonconstitutional grounds, finding that "the President, in issuing the Executive Order, exceeded the scope of the authority delegated to him by Congress." *Hawai'i* v. *Trump*, 859 F. 3d, at 755.

On June 14, 2017, the day that § 2(c) would have expired under EO-2 as written and if it had not been enjoined, the President issued a memorandum resetting

the effective dates of the enjoined provisions as the dates the injunctions are lifted. See *infra*, at 6.

On June 26, 2017, this Court granted certiorari, stayed the injunctions in part, and directed briefing on mootness.

SUMMARY OF ARGUMENT

Whether the date for mootness of § 2(c) is the original June 14 date or September 24 (90 days from this Court's partial stay of the injunctions) is a question that will itself be moot by the time this case is argued on October 10. Assuming there are no further extensions, § 2(c) will have expired, it will not operate to inhibit any person from entering this country, and no person will have a legally cognizable interest in enjoining it. That is the very essence of mootness.

No exception to the mootness rule applies. The issue is not "capable of repetition" within the meaning of this Court's cases. There is not a "reasonable likelihood" that the circumstances which brought about this extraordinary order will recur, and mere speculation is not sufficient.

The expiration of an order that was planned to be temporary from the beginning and not as a response to this litigation is not a "voluntary cessation" within the meaning of that exception to the mootness rule. Although this Court has not directly addressed this point, there is a consensus among the courts of appeals on it.

When a federal civil case becomes moot pending review, the normal practice is to vacate the lower court decision under the rule of *United States* v. *Munsingwear*. Vacatur is particularly appropriate in this case, involving sensitive matters of separation of powers that

should be addressed by this Court but cannot be because of mootness.

The *U. S. Bancorp* exception to vacatur, forfeiture of that remedy by a party who settles the case, does not apply in this case. Under *Alvarez* v. *Smith*, that exception does not apply when mootness is caused by an action of a party that is "basically unrelated" to the litigation. In this case, the 90-day duration of the suspension was part of the plan from the beginning, before any litigation was commenced.

These cases are moot as to § 2(c), and the decisions of the courts of appeals should be vacated to the extent they affirm injunctions against enforcement of that section.

ARGUMENT

I. The challenges to § 2(c) will be moot before argument.

A. Effective Date and Expiration Date.

In its *per curiam* opinion granting certiorari and granting a stay in part, this Court directed the parties "to address the following question: 'Whether the challenges to § 2(c) became moot on June 14, 2017.' " *Trump* v. *International Refugee Assistance Project*, 582 U. S. __ (No. 16-1436, June 26, 2017) (slip op., at 9) ("*Trump* v. *IRAP*"). Section 2(c), by its terms, expires 90 days from its effective date. The original effective date was March 16, so the original expiration date was June 14. See *ibid.* If the effective date is the date of this Court's order partially staying the injunction, June 26, the expiration date is Sunday, September 24, or arguably the following business day, Monday, September 25. Because oral argument in this case has been set for October 10, the question of which of these dates is

the date the challenge becomes moot will itself be moot before oral argument in this case.

On the original expiration date of June 14, the President issued a memorandum regarding the effective date. See Presidential Memorandum for the Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence (June 14, 2017), https://www.whitehouse.gov/the-press-office/2017/06/14/presidential-memorandum-secretary-state-attorney-general-secretary, with the subject line "Effective Date in Executive Order 13780." That memorandum "declare[d] the effective date of each enjoined provision to be the date and time at which the referenced injunctions are lifted or stayed with respect to that provision." The memorandum further provided that it was to be construed "to amend the Executive Order" "[t]o the extent it is necessary."

The memorandum did not specify whether the effective date reboot was based on a complete or partial stay, but the executive branch has treated the partial stay issued by this Court as making the order effective, and no party has objected to this treatment. In an announcement on its website, the State Department said: "As of June 29, 2017, we began implementing the executive order at our embassies and consulates abroad in compliance with the Supreme Court's decision and in accordance with the Presidential Memorandum issued on June 14, 2017. Our implementation is in full compliance with the Supreme Court's decision." U. S. Dept. of State, Important Announcement: Executive Order on Visas, https://travel.state.gov/content/travel/en/news/important-announcement.html (viewed Aug. 2, 2017).

If this Court's partial stay were not sufficient to trigger the "effective date" under the June 14 memorandum, the executive order would not yet be in effect. If the memorandum was not effective to reset the

effective date, then § 2(c) of the order would have expired by its terms, and again it would not be in effect. Yet the Government treated the order as being in effect, and the plaintiffs did not challenge its implementation on the basis that it was not. They challenged the Government's interpretation of the scope of this Court's stay and obtained relief from some applications of the order on that basis, part of which was quickly stayed by this Court. See Order of July 19, 2017, in No. 16-1540, *Trump* v. *Hawaii*; Hawaii Response to Motion for Clarification 6-9 (describing proceedings and contentions in District Court). Thus it appears to be undisputed that the President's memorandum effectively reset the effective date for the enjoined portions of the order to June 26, 2017, but § 2(c) will still expire before this case is argued.

B. The Mootness Rule.

The doctrine of mootness forms part of the boundary of the judiciary's constitutional grant of power. A moot case lies outside the boundary. See *Already, LLC* v. *Nike, Inc.*, 568 U. S. 85, 90-91 (2013). "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.' " *Id.*, at 91 (quoting *Murphy* v. *Hunt*, 455 U. S. 478, 481 (1982) (*per curiam*)).

Absent a further extension, by the time this case is argued none of the plaintiffs in either action will have a legally cognizable interest in enjoining the enforcement of an expired order or in having it declared invalid. This is all the relief that plaintiffs have asked, see First Amended Complaint in *International Refugee Assistance Project* v. *Trump*, U. S. D. C. Md., No. 8:17-cv-00361-TDC, at 52-53; Second Amended Complaint in

State of Hawaii v. *Trump*, U. S. D. C. Hawaii, No. 1:17-cv-00050-DKW-KJM, at 37, except for costs and attorneys' fees, and these collateral demands are insufficient to maintain jurisdiction. See *Lewis* v. *Continental Bank Corp.*, 494 U. S. 472, 480 (1990). Plaintiffs have not asked for damages in either case, and given this Court' recent decision in *Ziglar* v. *Abbasi*, 582 U. S. __ (No. 15-1358, June 19, 2017), no such demand could credibly be made regardless of the merits of the case.

This case meets the basic definition of mootness. It is moot unless it comes within one of "the long-recognized exceptions to mootness." *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U. S. 167, 190 (2000).

II. No "exception" to mootness applies.

A. Exceptions v. Scope of Rules.

This Court's decisions over many years have established that the mootness doctrine is an aspect of the Constitution's limitation of the judicial power to cases and controversies, *Laidlaw*, 528 U. S., at 180, and also that there are a number of exceptions. See *id.*, at 190. The inconsistency of these two propositions has occasionally been noticed. If a case is not within the judicial power, then the judiciary has no authority to assert jurisdiction by creating a policy-based exception. See *United States Parole Commission* v. *Geraghty*, 445 U. S. 388, 411-413 (1980) (Powell, J., dissenting); Hall, The Partially Prudential Doctrine of Mootness, 77 Geo. Wash. L. Rev. 562, 563-564 (2009).

Professor Hall suggests bifurcating mootness into constitutional and prudential branches, 77 Geo. Wash. L. Rev., at 565, while other commentators suggest abandoning the constitutional basis of moot-

ness altogether. See *id.*, at 564-565, nn. 11 and 12. *Amicus* believes that a better approach is to recast the "exceptions" as more nuanced definitions of the contours of the rule. This is similar to what the Court has done with habeas corpus retroactivity. The so-called "first exception" to the rule of *Teague* v. *Lane*, 489 U. S. 288 (1989), is now recognized as a part of the definition of the rule itself, not an exception to it. See *Schriro* v. *Summerlin*, 542 U. S. 348, 352, n. 4 (2004). This was essentially Justice Powell's approach in *Geraghty*, 445 U. S., at 412. Collateral consequences and defense against a credible threat of recurrence *supply* the needed continuing personal stake rather than furnish a policy-based exception to this constitutional prerequisite to judicial power. This point may be academic for the present case because none of the "exceptions" apply regardless of how they are characterized, but the matter should be clarified either in this case or in another case in the near future.

B. Capable of Repetition Yet Evading Review.

In some cases, a court may proceed to decision despite facial mootness if the underlying issue is "capable of repetition, yet evading review." See *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911). The rule is narrower than this shorthand description, though. "A dispute falls into that category, and a case based on that dispute remains live, if '(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again.' " *Turner* v. *Rogers*, 564 U. S. 431, 439-440 (2011) (quoting *Weinstein* v. *Bradford*, 423 U. S. 147, 149 (1975) (*per curiam*)).

The "capable-of-repetition doctrine" is not as broad as its capsule description sounds but instead "applies only in exceptional situations . . . ." *City of Los Angeles* v. *Lyons*, 461 U. S. 95, 109 (1983). The short duration, by itself, is not sufficient, and "capable of repetition" does not capture the full meaning of the second prong. Repetition must not be a mere possibility, there must be a reasonable expectation of it.

Turner v. *Rogers* illustrates the kind of case that qualifies. Turner had been found in contempt and sent to jail for not paying support without a finding that he was able to pay, and he was neither able to retain counsel nor appointed counsel. See 564 U. S., at 436-438. His 12-month contempt sentence was far too short for full review up the appellate chain, but Turner's chronic arrears created "a more than 'reasonable' likelihood that [he] will again be 'subjected to the same action,' " and in fact he already had. See *id.*, at 440. Similarly, in *Roe* v. *Wade*, 410 U. S. 113, 125 (1973), Jane Roe's 1970 pregnancy was long past by the time of this Court's decision, but another was entirely possible.

On the other hand, in *Spencer* v. *Kemna*, 523 U. S. 1, 3 (1998), a challenge to parole revocation became moot when the prisoner's term was completed. The possibility that the former prisoner might once again be paroled and have his parole revoked did not rise to the "reasonable likelihood" level. See *id.*, at 18; see also *DeFunis* v. *Odegaard*, 416 U. S. 312, 320, n. 5 (1974) (speculative possibility that last-term law student might not graduate and need to reapply was insufficient).

Similarly, in *City News & Novelty, Inc.* v. *Waukesha*, 531 U. S. 278 (2001), a business challenging the procedural adequacy of a city's licensing requirement withdrew its application after petitioning for certiorari in this Court because it could not compete with a

" 'larger and more modern' " purveyor of pornography. See *id.*, at 282-283. The remote possibility that the company might re-enter the business was insufficient for " 'a legally cognizable interest in the outcome.' " *Id.*, at 283 (quoting *County of Los Angeles* v. *Davis*, 440 U. S. 625, 631 (1979)).

City News distinguished *Erie* v. *Pap's A. M.*, 529 U. S. 277 (2000), another case involving a failed "adult business," on the basis of which party was seeking review and which one was seeking dismissal for mootness. *Erie* came up on review from a state court, so *Munsingwear* vacatur was not an option. See 529 U. S., at 305 (Scalia, J., concurring in the judgment); see also Part III, *infra* (discussing *Munsingwear*). "Thus, had we declared *Erie* moot, the defendant municipality would have been saddled with an 'ongoing injury,' *i. e.*, the judgment striking its law." *City News*, 531 U. S., at 284 (citing *Erie*, *supra*, at 288). The "speculation" that Pap's A. M. might reenter the business, "standing alone," would not have been sufficient to "shield the case from a mootness determination." *Id.*, at 283. Because the City of Waukesha had prevailed in state court, that problem was not present in *City News*. *Id.*, at 284.

City News and *Erie* indicate that the key element is the tangible interest of a party in preserving, reversing, or vacating a decision on a question of law that the party has a real possibility of needing to litigate in the future. Had the City of Erie been "saddled" with an adverse decision, any effort to enforce its law would have been quickly enjoined at the behest of a plaintiff who could cite that decision as collateral estoppel or res judicata. In these "exceptional situations" that interest is sufficient to maintain a live controversy, even when the specific dispute that brought the decision about is moot.

This same interest was noted in a different but related context in *Camreta* v. *Greene*, 563 U. S. 692 (2011). Officials with child protection responsibilities had received a decision that they had violated the Fourth Amendment but prevailed on qualified immunity. If the decision stood, they would not have immunity if they repeated the same conduct that they believed to be legal performance of their duties, and this was a sufficient personal stake for them to seek review in this Court despite being prevailing parties in the court of appeals. See *id.*, at 702-703.

In most cases, avoiding mootness requires that both parties retain a stake in the outcome. In *Camreta*, even though the officials were able to seek review, the case was nonetheless moot because the child had moved across the country and would shortly no longer be a child, so there was "not the slightest possibility" of repetition. See 563 U. S., at 711. This was sufficient for a finding of mootness and a partial *Munsingwear* vacatur. See *id.*, at 714, and n. 11. Similarly, *Turner* v. *Rogers*, 564 U. S., at 440, distinguished *DeFunis* on this basis. The contours of the *Erie* exception to the "both parties" rule need not be considered in this case, though, because repetition is not likely and neither party has engaged in the kind of "gamesmanship" that was of concern there. See *Bunting* v. *Mellen*, 541 U. S. 1019, 1021 (2004) (Stevens, J., respecting the denial of certiorari).

The 90-day suspension in § 2(c) surely qualifies as "too short to be fully litigated" for the first prong of the test, see *Turner* v. *Rogers*, 564 U. S., at 439-440, so the key inquiry is whether repetition is "reasonably likely." Once § 2(c) has lapsed, it is highly unlikely that a new suspension will be imposed any time in the foreseeable future, and that is sufficient to end this case.

The events of the last year have been unprecedented in many ways. The 90-day suspension of admissions from 6 particularly problematic countries, see EO-2, § 1(e), was a short-term measure by an incoming administration that determined that a new policy considerably more restrictive than the existing policy was needed. The suspension has been reissued once and extended once, largely because of the current litigation, but if the Government allows it to lapse without further extension it would likely be on the basis that more permanent and targeted measures are ready.[2] If that point has been reached by the time this case is argued, it is extremely unlikely that the circumstances that brought about the need for the suspension will recur at any time in the foreseeable future. The current administration and future ones will review the restrictiveness of alien admission policies, to be sure, but a shift of the same magnitude and direction as we have seen this year is highly unlikely. The possibility is much more speculative than the ones deemed insufficient in *Spencer* and *City News*. The "reasonably likely" prong of the test is not met. The question is not even close.

C. Voluntary Cessation.

"The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox* v. *SEIU, Local 1000*, 567 U. S. 298, 307 (2012). "Challenged" is a better term than "unlaw-

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2. This brief is written two months before argument of this case with regard to what action should be taken in light of the situation at that time. The discussion must necessarily refer to what we expect the situation to be as we cannot be certain.

ful" for the statement of this rule, cf. *Already, LLC* v. *Nike, Inc.*, 568 U. S. 85, 91 (2013), because the lawfulness of the conduct is necessarily disputed and undetermined at the time the court addresses the threshold question of mootness.

However it is stated, though, the central concern of the rule is manipulation by the party whose conduct is challenged. "Otherwise, a defendant could engage in unlawful conduct, *stop when sued to have the case declared moot*, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Ibid.* (emphasis added). The purpose of the rule suggests a limitation on its scope. "Voluntary cessation" refers to cessation motivated by the litigation with the purpose of having it declared moot. "The voluntary cessation doctrine does not apply when the voluntary cessation of the challenged activity occurs because of reasons unrelated to the litigation." 15 J. Moore et al., Moore's Federal Practice § 101.99[2] (3d ed. 2017).

This Court has not had occasion to squarely address whether the doctrine applies to a voluntary cessation motivated by factors external to the litigation, but the courts of appeals have. "[I]n order for this exception to apply, the defendant's voluntary cessation must have arisen *because* of the litigation." *Public Utilities Commn.* v. *FERC*, 100 F. 3d 1451, 1460 (CA9 1996) (emphasis in original); accord, *O'Connor* v. *Washburn Univ.*, 416 F. 3d 1216, 1221-1222 (CA10 2005); *E. I. Du Pont de Nemours & Co.* v. *Invista B. V.*, 473 F. 3d 44, 47 (CA2 2006).

"Circuit courts have routinely held that the voluntary cessation exception is not invoked when the challenged conduct ends because of an event that was scheduled before the initiation of the litigation, and is not brought about or hastened by any action of the defendant." *ACLU of Massachusetts* v. *U. S. Conference*

of Catholic Bishops, 705 F. 3d 44, 55 (CA1 2013). In that case, the challenged contract had been completed and expired, and the tax dollars at issue had already been spent. The government's new grants to different grantees did not involve the underlying issue. See *id.*, at 53-54. "This, in our view, is not a case of voluntary cessation so as to invoke the exception." *Id.*, at 55. Similarly, in *O'Connor*, the challenged art exhibition ended on schedule "through the normal course of events," not because of the litigation, and the voluntary cessation doctrine did not apply. See 416 F. 3d, at 1221-1222.

In the present case, the Government has intended from the beginning that the suspension of entries from the named countries be a temporary 90-day measure. The government action in response to the litigation has been to extend the termination date, the opposite of the concern behind the "voluntary cessation" doctrine. The doctrine does not apply, so the Court need not ask if its test is met. Even if the test did apply, though, the test would be met. For the reasons stated in the previous section, it "could not reasonably be expected" that a new restriction of this type will be imposed in the foreseeable future, and speculation to that effect is not sufficient to avoid mootness. See *Already, LLC*, 568 U. S., at 92.

III. The decisions of the courts of appeals should be vacated under *Munsingwear*.

"When a [federal] civil suit becomes moot pending appeal," this Court's " 'established' (though not exceptionless) practice . . . is to vacate the judgment below." *Camreta* v. *Greene*, 563 U. S. 692, 712 (2011) (citing *United States* v. *Munsingwear*, 340 U. S. 36, 39 (1950)). Indeed, this was already "established practice"

in 1950. *Munsingwear* cited a long string of cases going back to the nineteenth century. See *United States* v. *Munsingwear*, 340 U. S. 36, 39, and n. 2 (1950); *New Orleans Flour Inspectors* v. *Glover*, 161 U. S. 101, 103 (1896).

This Court "normally . . . vacate[s] the lower court judgment in a moot case because doing so 'clears the path for future relitigation of the issues between the parties,' preserving 'the rights of all parties,' while prejudicing none 'by a decision which . . . was only preliminary.' " *Alvarez* v. *Smith*, 558 U. S. 87, 94 (2009) (quoting *Munsingwear*, 340 U. S., at 40). That is, vacatur is the rule, and letting the lower court decision stand is the exception. There is no ground for making an exception in this case.

There is much to be said for clearing the path in this case. Foreign affairs have long been recognized as a particularly sensitive area where courts must tread carefully. See *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 111-112 (1948); see also *Holder* v. *Humanitarian Law Project*, 561 U. S. 1, 33-36 (2010). "Energy in the executive" was recognized as essential from the beginning. See The Federalist No. 70, p. 423 (C. Rossiter ed. 1961) (A. Hamilton). The sensitive separation of powers implications make a compelling case for decision by this Court. See Pet. for Cert. 33-34. Yet the merits cannot be decided by this Court because the case is moot. If the Government was entitled to free itself from the binding effect of an unreviewable decision of a lower court regarding price control formulas on underwear, see *Munsingwear*, 340 U. S., at 40-41, then it surely is entitled to do so regarding the authority of the President to take steps he deems necessary for protection of the nation and its people from terrorism.

Vacatur must be granted when mootness results from circumstances that are not attributable to either party ("happenstance") or are attributable to the unilateral action of the party who prevailed in the lower court. See *U. S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U. S. 18, 23 (1994). A nonprevailing party who agreed to settle the litigation, however, "voluntarily forfeited his legal remedy . . . thereby surrendering his claim to the equitable remedy of vacatur." *Id.*, at 25.

This emphasis on voluntariness bears a strong resemblance to the "voluntary cessation" doctrine described in Part II C, *supra*. Not surprisingly, *Alvarez* v. *Smith*, 558 U. S. 87 (2009), comes to a position very similar to the consensus of the court of appeals decisions on that doctrine. The voluntary action needed to forfeit the remedy of vacatur must have a causal link to the present case. In *U. S. Bancorp*, the bank settled the case in which the decision had been rendered, while in *Alvarez* the local officials were sued in federal court while forfeiture actions proceeded in state court. See *id.*, at 95-96. The "federal case played no significant role in the termination of the separate state-court proceedings" and return of the property. See *id.*, at 96-97. From this determination, *Alvarez* concluded, the "ordinary practice" should be followed, vacating the decision and " 'clear[ing] the path' " under *Munsingwear*.

Alvarez notes *Munsingwear* itself as an example of mootness being caused by an act of the nonprevailing party without forfeiting the vacatur remedy. See *id.*, at 96. Injunctive relief became moot when the company's products were decontrolled on November 12, 1946. See *Fleming* v. *Munsingwear, Inc.*, 162 F. 2d 125, 127 (CA8 1947). The obvious reason is that the war was over along with the inflationary pressures that justified price

controls. The reason was "basically unrelated" to the litigation. *Alvarez*, 558 U. S., at 96.

This case is essentially the same as *Munsingwear* in this regard. The 90-day expiration of § 2(c) was predetermined for reasons that have nothing to do with this litigation. The section is an extraordinary measure that can and should expire when it is no longer needed, and its expiration was scheduled at the outset.

This case resembles the "happenstance" cases more than the "settlement" cases. See *Alvarez*, 558 U. S., at 94. The court of appeals decisions regarding § 2(c) must be vacated under *Munsingwear*. Where other issues remain "live," a *Munsingwear* vacatur may be limited to the moot issues. See *Arave* v. *Hoffman*, 552 U. S. 117, 118-119 (2008) (*per curiam*).

CONCLUSION

The judgment of the courts of appeals in these cases should be vacated as moot to the extent they address the validity of § 2(c) of Executive Order 13780.

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Respectfully submitted,

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